STATE OF MICHIGAN
IN THE SUPREME COURT

ALLY FINANCIAL, INC. Plaintiff-Appellant, v STATE TREASURER, STATE OF MICHIGAN, AND DEPARTMENT OF TREASURY, Defendants-Appellees.	Supreme Court No. 154668 Court of Appeals No. 327815 Court of Claims No. 13-49-MT
SANTANDER CONSUMER USA, INC. Plaintiff-Appellant, v STATE TREASURER, STATE OF MICHIGAN, AND DEPARTMENT OF TREASURY, Defendants-Appellees.	Supreme Court No. 154669 Court of Appeals No. 327832 Court of Claims No. 13-114-MT
SANTANDER CONSUMER USA, INC. Plaintiff-Appellant, v STATE TREASURER, STATE OF MICHIGAN, AND DEPARTMENT OF TREASURY, Defendants-Appellees.	Supreme Court No. 154670 Court of Appeals No. 327833 Court of Claims No. 13-113-MT

APPELLEES STATE TREASURER, STATE OF MICHIGAN, AND, MICHIGAN DEPARTMENT OF TREASURY'S SUPPLEMENTAL BRIEF

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Laura Moody (P51994)
Chief Legal Counsel

Jessica A. McGivney (P64553)
Emily C. Zillgitt (P73792)
Assistant Attorneys General
Attorneys for State Treasurer, State of Michigan, and Dep't of Treasury
Defendants - Appellees
Revenue & Collections Division
G. Mennen Williams Bldg., 2nd Fl.
525 W. Ottawa St., P.O. Box 30754
Lansing, Michigan 48909
(517) 373-3203

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STATUTES INVOLVED

MCL 205.54i:

(1) As used in this section:

(a) "Bad debt" means any portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166. A bad debt shall not include any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and repossessed property.

(3) After September 30, 2009, if a taxpayer who reported the tax and a lender execute and maintain a written election designating which party may claim the deduction, a claimant is entitled to a deduction or refund of the tax related to a sale at retail that was previously reported and paid if all of the following conditions are met:

(a) No deduction or refund was previously claimed or allowed on any portion of the account receivable.

(b) The account receivable has been found worthless and written off by the taxpayer that made the sale or the lender on or after September 30, 2009.

(4) Any claim for a bad debt deduction under this section shall be supported by that evidence required by the department. The department shall review any change in the rate of taxation applicable to any taxable sales by a taxpayer claiming a deduction pursuant to this section and shall ensure that the deduction on any bad debt does not result in the taxpayer claiming the deduction recovering any more or less than the taxes imposed on the sale that constitutes the bad debt.

MCL 24.232:

> (5) A guideline, operational memorandum, bulletin, interpretive statement, or form with instructions is not enforceable by an agency, is considered merely advisory, and shall not be given the force and effect of law. An agency shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to support the agency's decision to act or refuse to act if that decision is subject to judicial review. A court shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to uphold an agency decision to act or refuse to act.

INTRODUCTION

In an order dated June 9, 2017, this Court asked the parties to file supplemental briefs addressing: (1) whether MCL 205.54i prohibits partial or full tax refunds on bad debt accounts that include repossessed property; (2) whether the Court of Appeals erred in giving the Department of Treasury's interpretation of MCL 205.54i respectful consideration in light of MCL 24.232(5); (3) how this Court should review the Department's decision to require RD-108 forms pursuant to MCL 205.54i(4) and, under that standard, whether the decision was appropriate; and (4) whether the Court of Appeals erred in holding that Ally Financial's election forms did not apply to accounts written off prior to the retailers' execution of the forms.

As to the first question, as recognized by two panels of the Court of Appeals and the Court of Claims, the plain language of MCL 205.54i(1) excludes all repossessed property from a bad debt deduction. There is no statutory language that affords a partial refund. Treasury's interpretation of MCL 205.54i(1), which essentially reiterates the plain statutory language, likewise excludes all repossessed property from a bad debt deduction.

As to the second question, because the statutory language of MCL 205.54i(1) unambiguously excludes repossessed property from the definition of bad debt, there is no need to defer to Treasury's interpretation of MCL 205.54i(1) as set forth in RAB 1989-61. The Court of Appeals relied on the statutory language, and it is not clear from the opinion whether the Court of Appeals even looked to Treasury's RAB, which, again, essentially restates the statutory text. Because no courts have given Treasury's interpretation the force of law and because the propriety of Treasury's

decision to deny the Ally and Santander's refund claims is based on the plain language of the statute, Subsection (5) of MCL 24.232 is not implicated.

As to the third question, in reviewing the Department's decision to require Forms RD-108 to support a bad debt refund request related to the sale of a vehicle, this Court should determine whether the Department exceeded the scope of its discretionary authority. In the General Sales Tax Act, the Legislature confers authority on the Department to determine the evidence required to support a bad debt refund request. The Department simply requires a taxpayer seeking a bad debt refund in connection with the sale of the vehicle to produce the receipt for the vehicle sale (the validated RD-108). The Department has a rational basis for this because it confirms sales tax was actually paid and the amount of sales tax. And the General Sales Tax Act requires taxpayers to maintain copies of receipts. Because the Department has a rational basis to require this documentation, this Court should not overrule the Department's exercise of discretion.

As to the fourth question, the Court of Appeals did not err when it ruled that Ally's election forms did not apply to the accounts for which it seeks a refund. Ally seeks a bad debt refund for the period of October 1, 2009, through June 30, 2010. Ally deemed these debts worthless and uncollectible, wrote the accounts off its books and records, and claimed a deduction from federal income tax in 2009 and 2010. In 2013 and 2014, Ally entered into election agreements with dealerships saying that it can claim the bad debt deduction for accounts "currently existing." An account cannot be "currently existing" when it was eliminated from a taxpayer's books three to five years earlier. The Court of Appeals did not err.

ARGUMENT

I. MCL 205.54i prohibits all repossessed property from a bad debt tax refund under the General Sales Tax Act.

MCL 205.54i allows a taxpayer to deduct certain transactions – bad debts – from its gross proceeds used for the computation of tax. The Legislature defined "bad debt" as:

> [a]ny portion of a debt that is related to a sale at retail taxable under this act for which gross proceeds are not otherwise deductible or excludable and that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code, 26 USC 166. [MCL 205.54i(1)(a).]

Significantly, the definition goes on to specifically exclude "repossessed property" from being a bad debt:

> A bad debt *shall not include* any finance charge, interest, or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or any portion of the debt recovered, any accounts receivable that have been sold to and remain in the possession of a third party for collection, and *repossessed property*. [MCL 205.54i(1)(a) (emphasis added).]

The goal of statutory construction is to discern and give effect to the intent of the Legislature by examining the most reliable evidence of its intent – the words of the statute. *Neal v Wilkes*, 470 Mich 661, 665 (2004). If the statutory language is unambiguous, courts presume that the Legislature intended the plainly expressed meaning, and judicial construction is neither permitted nor required. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402 (2000). The debts at issue are secured by collateral – the vehicle. When Ally and Santander take possession of the vehicle,

the vehicle becomes repossessed property, and no bad debt deduction is allowed according to the statute's plain terms.

A. There is no partial refund according to the statute's plain terms.

The remaining balance after repossession is not eligible for a bad debt deduction according to the statute's plain terms. That the Legislature did not provide for a partial refund for accounts that include repossessed property is clear from the language of MCL 205.54i(1): "a bad debt shall not include . . . repossessed property." The language in Section 54i(1) is plain. It says "repossessed property," not "the unpaid balance after repossession proceeds are applied," and not "the uncollectable amounts after repossession." There is no statutory provision that provides for a partial or apportioned refund. There is no statutory exception to the exclusion of repossessed property for "net unpaid balances of accounts where collateral is repossessed" or "uncollectable debts after repossession."

There is likewise no language in the statue that allows Ally and Santander to take a deduction in connection with only amounts for which they have an actual economic loss. Nothing in the statute says anything about economic loss; instead, it talks about a physical item—"repossessed property." In fact, Subsection (1) excludes from the definition of bad debt at least two situations where a lender may have a loss: repossessed property (if sale of collateral is less than debt) and the sale of debt to a third party (assuming debt is sold for less than what is owed). Indeed, Ally and Santander's position is premised on what it wishes the statute said, instead of what the statute actually says. As the Court of Appeals aptly recognized

below "[t]he proper role of the judiciary is to interpret and not write the law." *Ally Financial, Inc et al v State Treasurer*, 317 Mich App 316, 327, 337 (2016). To read MCL 205.54i(i) as the Lenders do, this Court must read additional language into the statue that does not exist, thereby violating a fundamental canon of statutory interpretation. *Robinson v City of Lansing*, 486 Mich 1, 15 (2010). If the Legislature intended a bad debt deduction for "net unpaid balances of accounts where collateral is repossessed" or "uncollectable debt after repossession" it easily could have stated as such. It did not.

B. The plain language of the statute excluding all repossessed property from a bad debt deduction is consistent with the right to repossess secured collateral under Michigan law.

Just like the exclusion of repossessed property from a bad debt tax deduction, repossession of secured collateral is an all-or-nothing proposition. The term repossess is defined consistent with the common understanding of the term. According to Merriam Webster's Collegiate Dictionary, the term "repossess" is a transitive verb that means: "(b) to take possession of (something bought) from a buyer in default of the payment of installments due." *Merriam Webster's Collegiate Dictionary*, (2014). Black's Law Dictionary provides a like definition of the noun repossession: "the act or an instance of retaking property; esp., a seller's retaking of foods sold on credit when the buyer has failed to pay for them. – Often shortened to *repo*." *Black's Law Dictionary*, (8th ed).

The Motor Vehicle Sales Finance Act provides that "a right of repossession of a motor vehicle provided in an installment sale contract shall be exercised only in

the manner provided in part 6 of article 9 of the uniform commercial code concerning taking possession of and disposing of collateral." MCL 492.114(c). Under the Uniform Commercial Code, a secured party may take possession of the collateral without judicial process if it proceeds without breach of the peace. MCL 440.9609.

In this case, the terms of the retail installment sales contracts provide for repossession if a purchaser pays late or breaks other promises under the contract:

> 4(d) . . . If you default, we may take (repossess) the vehicle from you if we do so peacefully and the law allows it . . . .
>
> 4(e) . . . If we repossess the vehicle, you may pay to get it back (redeem). We will tell you how much to pay to redeem. Your right to redeem ends when we sell the vehicle.
>
> 4(f) . . . If you do not redeem, we will sell the vehicle. We will send you a written notice of sale before selling the vehicle. We will apply the money from the sale, less allowed expenses, to the amount you owed… If any money is left (surplus), we will pay it to you. If money from the sale is not enough to pay the amount you owe, you must pay the rest to us. If you do not pay this amount when we ask, we may charge you interest at the highest lawful rate until you pay. (Ex 7, paragraph 4 (a) – (g) to Ally's brief in repose to Treasury's motion for summary disposition.)

Here, Ally and Santander chose to take back the motor vehicles in an effort to satisfy the debt secured by the motor vehicles. They did not take partial possession; they took full possession of the whole vehicle. When Ally and Santander exercised their right to take possession of the motor vehicles, the motor vehicles became repossessed property. Any outstanding debt that may remain after the repossession and sale of the repossessed motor vehicles does not change the fact that the vehicles were repossessed and are excluded from the definition of bad debt.

The bad debt statute speaks only to the property – whether or not it is repossessed. The language of the statute does not contemplate the *value* of repossession. Once property is repossessed, the underlying debt is not eligible for a deduction as bad debt. Ally and Santander conflate the concepts of property and value. The fact that the value of the repossessed vehicle may not satisfy the debt is not relevant to the issue of whether the vehicles are repossessed property under the bad debt statute. The failure of the sale of a repossessed vehicle to satisfy the underlying debt does not turn the exclusion of repossessed property from the definition of bad debt into a partial exclusion.

When Ally and Santander chose to take possession of the motor vehicles securing the debt after default, the vehicles became repossessed property. If the sale was not sufficient to satisfy the underling debt, the Lenders were entitled to collect the balance from the buyer in accordance with their retail sales contracts. But where Ally and Santander opted to exercise their right to repossess the vehicles, the Legislature precluded them from deducting any remaining debt – in full or in part – under the plain language of the bad debt statue of the GSTA.

II. Courts do not err in giving respectful consideration to Revenue Administrative Bulletins issued by Treasury under authority granted by the Revenue Act, notwithstanding the Administrative Procedures Act.

It is not entirely clear whether the Court of Appeals deferred to Treasury's interpretation of MCL 205.54i concerning the exclusion of repossessed property from the definition of bad debt. *Ally Financial, supra* at 337. The opinion does state that the Court of Claims did not err in affording respectful consideration to

Treasury's interpretation of the bad statute, although such consideration was made after finding the statute unambiguous. *Id.* at 330. But Treasury's interpretation as set forth in Revenue Administrative Bulletin 1989-61 essentially restates the statute's plain and unambiguous terms. Consistent with the statutory language used by the Legislature, Treasury's 'interpretation' of the statute excludes all repossessed property from the definition of bad debt and does not provide for the partial deductions that the Ally and Santander seek. RAB 1989-61 specifically provides that the bad debt deduction for sales tax purposes shall not include any amount represented by "sales tax charged on property that is subsequently repossessed." Cf. MCL 205.54i(1)(a) ("A bad debt shall not include . . . repossessed property.").

While acknowledging that Treasury's interpretation is consistent with the plain and unambiguous language of the bad debt statute, the Court of Appeals relied on the statute's plain terms. *Ally Financial, supra* at 337. As discussed above, it is apparent from the statutory language itself that MCL 205.54i(1) prohibits all repossessed property from a bad debt tax refund.

It is necessary to turn to Treasury's RAB 1989-61 only if this Court finds an ambiguity or a gap in MCL 205.54i(1) that excludes repossessed property from the definition of bad debt; otherwise, RAB 1989-61 is not relevant to the outcome of this case. Neither the Lenders nor any previous court has identified any ambiguities in MCL 205.54i(1). To the extent that the statutory language is deemed ambiguous and reliance on Treasury's interpretation is appropriate, RAB 1989-61 is entitled to respectful consideration, and there are no cogent reasons warranting reversal. Any

such respectful consideration given by the Court of Appeals to Treasury's interpretation of the statute was proper.

A. Treasury's Revenue Administrative Bulletins (RABs) are entitled to respectful consideration.

As the agency responsible for administering the General Sales Tax Act, Treasury's interpretation of bad debt provision is entitled to respectful consideration. The Revenue Act specifically authorizes Treasury to "issue bulletins that index and explain current department interpretations of current state laws" administered by Treasury. MCL 205.3(f). RABs are not adopted under the Administrative Procedures Act and do not have the force of law. Nonetheless, this Court has recognized that the construction of a statute by a state administrative agency charged with administering the statute "is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons." *In re Compliant of Rovas*, 482 Mich 90, 103 (2008). If an agency's interpretation does not conflict with the statute, then "there are no such 'cogent reasons' to overrule it." *Younkin v Zimmer*, 497 Mich 7, 10 (2014).

The *Younkin* case involved the Department of Licensing and Regulatory Affairs' interpretation of MCL 418.851, which requires workers' compensation hearings to be held "at the locality where the injury occurred." The administrators interpreted the term 'locality' to mean 'district' or "a definite region" and designated eleven hearing districts in the State. *Id*. at 3. Although the interpretation apparently was not undertaken via formal agency action, this Court nonetheless noted that such interpretations are entitled to "respectful consideration." *Id.* And

the Court held that "[b]ecause defendants' interpretation does not 'conflict with the Legislature's intent as expressed in the language of the statute at issue,' there are no such "cogent reasons" to overrule it." *Id.*

Here while RAB 1989-61 restates the statutory language of MCL 205.54i more than it interprets that language, the bulletin represents Treasury's interpretation of this provision since 1989 and in no way conflicts with the statue. Both the statue and the RAB exclude all repossessed property from the definition of bad debt. Neither the statue nor the RAB provide for a partial exemption for repossessed property. Treasury's RAB 1989-61 is entitled to respectful consideration.

B. MCL 24.232(5) of the Administrative Procedures Act does not preclude respectful consideration of Treasury's statutory interpretations.

Judicial review of Treasury's RAB 1989-61, if necessary, is entitled to respectful consideration and should not be overruled without cogent reasons notwithstanding MCL 24.232(5). MCL 24.232(5), a provision of the Michigan Administrative Procedures Act, has three subparts. First, it provides that "a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions is not enforceable by an agency, is considered merely advisory, and shall not be given the force or effect of law." Second, it provides that "an agency shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to support the agency's decision to act or refuse to act if that decision is subject to judicial review." Third, it provides that "a court

shall not rely upon a guideline, operational memorandum, bulletin, interpretive statement, or form with instructions to uphold an agency decision to act or refuse to act."

As to the first, Treasury does not submit that its RAB has the force or effect of law, and no court below has held as such. Accordingly this provision is inapplicable to this case. As to the second, Treasury did not rely on its RAB to "act or refuse to act." As the administrator of the General Sales Tax Act, Treasury is bound to follow and enforce the statues as written. And that is what occurred in this case. Treasury followed the plain language of MCL 205.54i and denied the Lenders refund request based on the Lenders' failure to meet the statutory standards that would allow for a refund and otherwise failed to provide the required documentation to substantiate its claims. That Treasury's RAB restates the statutory language regarding the exclusion of repossessed property from the definition does not change the fact that Treasury's refund denial is based on the plain language of MCL 205.54i. Accordingly, this provision is inapplicable to this case.

The third provision in Subsection (5) relates to the judicial review of an agency's decision to act or not to act and precludes courts from relying on a guideline, memorandum, bulletin, interpretive statement, or form with instructions to uphold an agency decision to act or refuse to act. There are three potential avenues in which judicial review of an administrative agency decision may be sought: (1) review pursuant to a procedure specified in a statute applicable to the particular agency, (2) the method of review for contested cases under the

Administrative Procedures Act (APA), MCL 24.201 *et seq.*; MSA 3.560(101) *et seq.*, or (3) an appeal pursuant to § 631 of the Revised Judicature Act, MCL 600.631; MSA 27A.631, and article 6, § 28 of Michigan's 1963 Constitution, in conjunction with MCR 7.104(A). See *Hopkins v Parole Bd*, 237 Mich App 629, 632 (1999); *Pontiac Food Ctr v Dep't of Community Health,* 282 Mich App 331, 335 (2008).

The provision in Subsection (5) relates to the judicial review of an agency's decision under the APA. But the scope of judicial review outlined in the APA applies only to a "contested case." MCL 24.301. A contested case is defined as "a proceeding . . . in which a determination of the legal rights . . . of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing." MCL 24.203(3). Treasury's decision to deny the refund claim at issue, approved by the Treasurer's designee during an informal conference, is not a contested case. See *In re Elias*, 294 Mich App 507 (2011). Moreover, the Revenue Act provides a specific procedure for judicial review applicable to Treasury decisions. MCL 205.22(2) provides that "a *taxpayer* aggrieved by an *assessment, decision, or order* of the department may appeal the contested portion of the assessment, decision, or order" to the Court of Claims or Michigan Tax Tribunal, at the taxpayer's option. MCL 205.22(2) (emphasis added). Ally and Santander appealed Treasury's denial of their bad debt sales tax refund under the Revenue Act in the Court of Claims. (Santander Complaints ¶ 6; Ally Complaint ¶ 6.) Accordingly, because this case is not an appeal filed (nor could it be) under the APA, the Subsection (5) sentence about judicial review of an agency decision is not applicable to appeals of Treasury actions under the Revenue Act or this case.

Indeed, there does not appear to be any Michigan case law interpreting the 2011 APA provision in Subsection (5) related to the judicial review of an agency's decision. And there is no indication that Public Act 270 of 2011 intended to address, impact or disrupt Treasury's authority or duties to administer the tax laws of this State.

Notwithstanding, the Legislature is presumed to know of and legislate in harmony with existing laws. *Herrick Dist Library v Library of Mich*, 293 Mich App 571 (2011). Subsection (5) still would not impact judicial review of this case even if it were *in pari materia* with the Revenue Act, because where statutes *in pari materia* are unavoidably in conflict and cannot be reconciled, the more specific statute controls. See *Walters v Leech*, 279 Mich App 707, 709-710 (2008). Because the Revenue Act, in existence since 1941, is exclusive to Treasury, it is more specific, and thus controls over any conflict with the APA.

Michigan jurisprudence has long recognized the clear standard of review for appellate courts to apply to an administrative agency's interpretation of a statute. *Rovas,* supra at 117 citing to *Boyer-Campbell v Fry*, 271 Mich 282 (1935). To the extent that the statutory language excluding repossessed property from bad debt is deemed ambiguous and reliance on Treasury's interpretation is appropriate, RAB 1989-61 is entitled to respectful consideration and should not be overruled without cogent reasons notwithstanding MCL 24.232(5).

III. Treasury did not exceed the scope of its discretionary authority in requiring Ally and Santander to support their refund requests with receipts for vehicle transactions.

In the General Sales Tax Act, the Legislature confers authority on the Department to determine the evidence necessary to support a bad debt refund. Accordingly, when reviewing the Department's decision to require taxpayers to produce Forms RD-108 to support bad debt refund requests, this Court should determine whether the Department exceeded the scope of the discretionary authority afforded to it by the Legislature. It did not.

Any claim for a bad debt deduction under the General Sales Tax Act "shall be supported by *that evidence* required by the department." MCL 205.54i(4) (emphasis added). Thus, the Legislature has conferred on the Department the discretion to determine the evidence a taxpayer must produce to support a bad debt refund claim. Where a decision is committed to the Department's discretion, that decision will be upheld unless there is no rational basis for it. *Guardian Indus Corp v Dep't of Treasury*, 198 Mich App 363, 382 (1993). The Department's exercise of its discretion in this matter should be upheld because there is a rational basis for it.

The Department exercises its discretion in bad debt cases by requiring a claimant seeking a refund in connection with the sale of a vehicle to produce copies of validated Forms RD-108 to establish sales tax was paid. The validated Form RD-108 is simply the receipt for the sale of the vehicle. Form RD-108 is submitted to the Secretary of State along with sales tax due on the vehicle transaction, unless the sale is exempt from law from sales tax. If the sale is exempt from tax, then no tax will be due. MCL 257.815(1). The Secretary of State issues a vehicle title upon

payment of the applicable sales tax or where the transaction is exempt from tax. MCL 257.815(2). Along with issuing the vehicle title, the Secretary of State validates the form by applying a bar-code-type number that confirms the form was filed, and returns a validated copy of the RD-108 to the dealer.

The Department has a rational basis for its requiring a taxpayer to support its bad debt refund request with the validated RD-108. In requiring a taxpayer to support its refund request with a validated RD-108, the Department is simply requiring the receipt for the vehicle sale. The Department does not require any record beyond what a taxpayer is already required to maintain under the General Sales Tax Act. Indeed, the General Sales Tax Act requires taxpayers to keep records, including receipts, for a period of four years. MCL 205.68(1). The Department's requirement as-applied to bad debt refunds is consistent with the General Sales Tax Act's general recordkeeping requirements.

The Department's requirement is also consistent with the statutory directive that Treasury ensures it is not refunding any more or less than the tax imposed on the transaction. MCL 205.54i(4). The dealerships, not Ally and Santander, remit sales tax to the State of Michigan. And the dealerships remit directly to the Secretary of State, not to the Department. Ally and Santander do not make retail sales and do not file sales tax returns in Michigan. In the absence of records Treasury cannot otherwise confirm that sales tax was actually paid on the transaction as required by the bad debt deduction. By requiring the validated RD-108, Treasury confirms that sales tax was actually paid, and in what amount. This

is not only prudent, but mandatory under section 54i before Treasury can issue a refund.

Moreover, section 54i of the General Sales Tax Act does not enumerate the evidence that the Department can or cannot require in connection with bad debt refund requests. Instead, it authorizes the Department to determine the evidence necessary to support a bad debt refund request. Ally and Santander argue that the General Sales Tax Act does not specifically require taxpayers to produce Forms RD-108. (App, p 28.) Using this logic, then *any* evidence the Department requires violates the statutory language, because the statutory language does not specify the evidence the Department can or cannot require. Ally and Santander's proposed interpretation of the statute also allows the taxpayer to dictate the evidence that is sufficient to support its refund request. This is contrary to the statutory language that entrusts the Department, not the taxpayer, with the discretion to determine the evidence necessary to support a bad debt refund claim.

In requiring validated Forms RD-108 to support a bad debt refund, the Department is simply acting pursuant the discretionary authority granted to it by the Legislature. Because it has a rational basis for requiring this form, the Department has not exceeded the scope of its discretionary authority.

IV. Ally Financial's election forms did not apply to the accounts at issue in its refund request.

Under the bad debt deduction's expanded definition of taxpayer, there are two entities that can theoretically claim a bad debt refund—the retailer that remitted tax to the Department and the lender holding the account receivable. The

General Sales Tax Act requires the parties to "execute and maintain" a written election stating which party may claim the deduction. MCL 205.54i(3). The issue in this case is whether an account that Ally has deemed worthless and uncollectible, written off its books and records, and for which it has already taken a deduction from income on its federal income tax returns, is "currently existing." The Court of Claims and Court of Appeals correctly ruled that those accounts are not "currently existing."

Ally seeks a refund for sales tax on bad debts that it wrote off during the period of October 1, 2009 through June 30, 2010. The "Agreement for Entitlement to Refund, Deduction or Credit" produced by Ally are all dated in 2013 or 2014—years *after* Ally wrote off the debt for federal income tax purposes. The election agreements apply to "Accounts currently existing or created in the future." *Ally Financial*, 317 Mich App at 327–28. Ally insists that the accounts it deemed worthless and wrote off its books and records three to five years earlier were "currently existing" at the time of execution of the election agreements.

To claim a bad debt deduction under section 166 of the Internal Revenue Code, the debt must be wholly or partially worthless. 26 USC 166(a)(1). "To be worthless, a debt must not only be lacking current value and be uncollectible at the time the taxpayer takes the deduction, but it must also be lacking potential value due to the likelihood that it will remain uncollectible in the future." *Cooper v Comm'r of Internal Revenue*, 143 TC 194, 218 (2014). The term "write-off" means a cancellation in account books or an amount canceled or lost. *The American Heritage Dictionary, Second College Edition* (1982). Black's Law Dictionary defines "write

off" as a verb, meaning "to transfer the entire balance (of an asset account) to an expense or loss account to reflect the asset's total loss of value." *Black's Law Dictionary,* (10th ed).

Therefore, when Ally claimed the bad debt deduction on its 2009 and 2010 federal returns, it did so because the accounts lacked any current or potential value. To write off the account meant to cancel the account, a recognition that the account had a total loss in value. Indeed, Ally could not claim the refund it seeks in this case *unless* the accounts were "worthless" and "written off as uncollectible in the claimant's books and records." MCL 205.54i(2). When Ally and the dealerships entered into election agreements years later, the accounts Ally had already written off were no longer existing on its books and records.

Ally argued in its reply brief that the accounts are "currently existing" because the debt is still owing. (Reply Br, p 9.) This is problematic for several reasons. First, if a "reasonable prospect" of recovery exists, a taxpayer cannot claim a bad debt deduction, *Riley v Comm'r of Internal Revenue*, 111 TC 1205 (2016); the debt would not be "worthless" if it could be recovered. Second, if a taxpayer claims the bad debt sales tax refund under Michigan law, and the consumer later pays all or part of the debt, that taxpayer is liable for the amount of taxes for which it previously received a refund. MCL 205.54i(2). Yet Ally does not file sales tax returns in Michigan. So if a customer pays the debt after Ally obtains the refund, as Ally argues may happen, Ally receives a windfall at the expense of other Michigan taxpayers. Finally, even if the *debt* exists, Ally charged off the *account* from its books and records. And its election agreements refer to accounts, not to the

underlying debt. *Ally Financial*, 317 Mich App at 327–28 (quoting the election agreements in this case).

Ultimately, the question in this case is whether an account that Ally deemed worthless and wrote off its books in 2009 or 2010 was "currently existing" in 2013 or 2014. Treasury submits the account is not "currently existing" years after it is written off. As a result, Ally lacked the written elections necessary to claim the bad debt deduction.

CONCLUSION AND RELIEF REQUESTED

Ally and Santander are not entitled to the bad debt refunds they seek. That repossessed property is expressly excluded from the definition of bad debt is in the clear and unambiguous language of MCL 205.54i(1). To the extent that MCL 205.54i(1) is ambiguous, Treasury's interpretation of MCL 205.54i(1) that repossessed property is excluded from the definition of bad debt is entitled to respectful consideration. Moreover, Treasury had a rational basis for requiring Ally and Santander to support their refund requests with the receipt for the sale of the vehicle. And Ally failed to maintain written elections stating that it can claim the bad debt refund as required by the General Sales Tax Act.

The Court of Appeals did not err. Ally and Santander's application for leave to appeal should be denied.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General

Laura Moody (P51994)
Chief Legal Counsel

/s/ Emily C. Zillgitt
Jessica A. McGivney (P64553)
Emily C. Zillgitt (P73792)
Assistant Attorneys General
Attorneys for State Treasurer, State of Michigan, and Dep't of Treasury
Defendants - Appellees
Revenue & Collections Division
G. Mennen Williams Bldg., 2nd Fl.
525 W. Ottawa St., P.O. Box 30754
Lansing, Michigan 48909
(517) 373-3203

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